

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PETER ERIKSEN, and MARY EMMA
ERIKSEN,

Plaintiffs,

vs.

WASHINGTON STATE PATROL, a
state agency, and agents 1-
10; KITTITAS COUNTY, a
municipal corporation, and
agents 11-20; and CITY OF
CLE ELUM, a municipal
corporation, and agents 21-
30,

Defendants.

NO. CV-05-0195-LRS

ORDER GRANTING DEFENDANTS CITY OF
CLE ELUM AND AGENTS 21-30 MOTION
TO DISMISS PURSUANT TO RULE 12(b)
AND RULE 41(b)

BEFORE THE COURT is Defendants' City of Cle Elum and Agents 21-30
Motion to Dismiss Pursuant to Rule 12(b) and Rule 41(b), Ct. Rec. 10,
filed February 24, 2006.

DISCUSSION

Pro se plaintiffs filed their Complaint on August 2, 2005
alleging personal injuries and civil rights violations arising from
events occurring on June 24, 2002. On October 5, 2005, this Court
entered an Order Re: Service (Ct. Rec. 8), directing plaintiffs to
serve upon Defendants the Summons and Complaint pursuant to Federal
Rules of Civil Procedure Rule 4.

1 If the plaintiffs fail to properly serve the summons and
2 complaint within 120 days of filing the complaint, Rule 4(m) directs
3 the Court to dismiss the case. However, Rule 4(m) provides that
4 dismissal for failure to serve is only appropriate in the absence of
5 good cause for the plaintiff's failure to show why service was not
6 made within the 120-day period. 4B CHARLES ALAN WRIGHT & ARTHUR R.
7 MILLER, FEDERAL PRACTICE AND PROCEDURE § 1137 at 340-69 (3d ed.2002)
8 [hereinafter "WRIGHT & MILLER"].

9 The 120-day time period is calculated from the filing of the
10 complaint, not the issuance of the summons. Two hundred forty-eight
11 (248) days have passed since plaintiffs filed their Complaint.
12 Plaintiffs have failed to properly serve the City of Cle Elum, as the
13 purported "waiver" plaintiffs describe in their paper titled
14 "Plaintiffs Objection to Motion of Defendants City of Cle Elum &
15 Agents 21-30 To Dismiss" is ineffective and cannot be utilized with a
16 defendant who is a governmental entity under Rule 4(j). Further,
17 plaintiffs have not served Agents 21-30 nor have they even attempted
18 to identify such agents through discovery.

19 Defendants further argue that plaintiffs cannot show good cause
20 for their failure to properly effect service when they have failed to
21 prosecute this action with reasonable diligence as required by
22 Fed.R.Civ.P. 41(b). Although plaintiffs indicate they have at least
23 attempted service of the Defendant City only, the mere effort to
24 obtain a waiver does not establish good cause for failure to timely
25 serve. *Khorozian v. McCullough*, 186 F.R.D. 325 (D.N.J.1999).
26 Plaintiffs have been on notice since February 24, 2006 that the
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1 service effected upon the City was not proper. Plaintiffs have not
2 even requested an extension of time to effect proper service.

3 Generally *pro se* litigants are allowed more latitude than
4 litigants represented by counsel to correct defects in service of
5 process and pleadings. *Moore v. Agency for Intern. Development*, 994
6 F.2d 874 (C.A.D.C 1993). However, as the Defendants correctly note,
7 the claims against the City and "unknown agents" are now time-barred
8 under the applicable statute of limitations for personal injuries and
9 42 U.S.C. §1983 claims. Personal injury claims in Washington must be
10 brought within a three-years limitations period pursuant to RCW
11 4.16.080. Claims under 42 U.S.C. §1983 must also be brought within
12 three years under R.C.W. 4.16.080(2). *Rose v. Rinaldi*, 654 F.2d 546,
13 547 (9th Cir. 1981). Under Rule 12(b)(6), the claims against the
14 Defendants must be dismissed with prejudice for failure to state a
15 claim upon which relief may be granted. Accordingly,

16 **IT IS ORDERED** that Defendants City of Cle Elum and Agents 21-30
17 Motion to Dismiss Pursuant to Rule 12(b) and Rule 41(b), **Ct. Rec. 10**,
18 filed February 24, 2006 is **GRANTED**. The claims against DEFENDANTS
19 CITY OF CLE ELUM AND AGENTS 21-30 are **DISMISSED with prejudice**.

20 **IT IS FURTHER ORDERED** that the District Court Executive shall
21 prepare and enter judgment consistent with this order.

22 **IT IS SO ORDERED**. The District Court Executive is directed to
23 enter this Order and forward a copy to counsel and *pro se* Plaintiffs.

24 **DATED** this 7th day of April, 2006.

25 **s/Lonny R. Suko**

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27 LONNY R. SUKO
28 UNITED STATES DISTRICT JUDGE